NO. 79-886

In the Supreme Court of the United States

OCTOBER TERM, 1979

THE UPJOHN COMPANY AND GERARD THOMAS, VICE PRESIDENT, SECRETARY AND GENERAL COUNSEL, PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM OF THE COMMITTEE ON CORPORATE LAW DEPARTMENTS OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK AS AMICUS CURIAE

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The Committee on Corporate Law Departments of the Association of the Bar of the City of New York files this memorandum with the consent of counsel for the petitioners and the Government to urge that the Court grant the petition for a writ of certiorari to review the decision of the Court of Appeals for the Sixth Circuit rendered in this case on June 28, 1979.

STATEMENT

On November 23, 1976 a special agent of the Internal Revenue Service issued a narrowly-drawn summons, under the authority of 26 U.S.C. §7602, to petitioners, Upjohn Company and Gerard Thomas, its Vice President, Secretary and General Counsel. The summons directed them to produce for governmental examination "[all] the files relative to the investigation conducted under the supervision of [the General Counsel]" into foreign political and governmental

payments made by Upjohn or any of its affiliates. (Pet. App. B at 11a.) The summons specifically defined the files to include, without limitation, "written questionnaires sent to managers" of Upjohn's foreign affiliates, and "memorandums or notes of the interviews conducted in the United States and abroad with officers and employees . . . ." (*Id.*) The summons was designed to reach the General Counsel and two outside attorney's documented communications with Upjohn employees made between January and March, 1976 in an internal, confidential legal investigation of foreign payments ordered by the Chairman of the Board. Petitioners refused to produce the requested records on the grounds that they were covered by the attorney-client privilege, or the so-called "work product" doctrine, and that the requisite standards for judicial enforcement of the summons had not been met.[1]

On August 31, 1977, upon petition of the Government, an order to show cause was entered against petitioners directing them to show cause why they should not be compelled to obey the summons. Upon assignment of the matter to a U.S. Magistrate and after hearing, the Magistrate ruled on February 23, 1978, as amended by letter dated March 11, 1978, that the "control group" test was the appropriate legal standard for determining "the circumstances under which a communication of an employee or agent of the corporation may be deemed to be the communication of the corporate client enabling the corporation to claim the attorney-client privilege." (Pet. App. B at 18a *et seq.*). The Magistrate stated the "control group" test as follows:

> [I]f the employee making the communication, of whatever rank he might be, was in a position to control or even to take a substantial part in a decision about any action which the corporation might take upon the resulting advice of the attorney, or if he was an authorized member of a body or group which had that authority, then in effect he was or personified the corporation when making the disclosure, and the privilege would apply, while in all other cases the employee would be merely giving the information to the lawyer to enable the latter to advise those in the corporation having the authority to act or refrain from acting on the advice.
> (Pet. App. B at 20a).

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[1] This memorandum *amicus curiae* is addressed solely to the District Court's application of the "control group" test in the determination of the existence of attorney-client privilege and does not discuss any other aspect of that Court's decision or any other issue presented by the parties.

Applying this test to the facts, the Magistrate found that the communications in question were not privileged:

> It is apparent from the record that the matter as to which the interviewees made the disclosures to Mr. Thomas was a matter of overwhelming importance to the Company but not one as to which any of the interviewees would be given any substantial role. When Mr. Thomas first heard of the questionable payments, he went first to the Chairman of the Board to discuss the matter. The questionnaire that was sent to the employees went out over the signature of the Chairman of the Board. Mr. Thomas' concern was with the SEC ramifications, the tax consequences, currency regulations, and the like. (Tr. 79-80). These are matters on the highest corporate level and hardly within the domain or authority of the persons interviewed. Clearly, these persons in completing the questionnaire and submitting to interviews were simply giving information to Mr. Thomas to enable him to advise the Board of Directors and its Chairman as to how to handle the securities, tax, and related problems which the questionable payments created. Only the latter had the authority to act in these areas. Thus the disclosures made by the interviewees to Mr. Thomas or the Company's outside counsel do not fall within the attorney-client privilege. (Pet. App. B at 22a-23a.)

The District Court on April 28, 1978 adopted the Magistrate's Report and Recommendation and further ordered on May 16, 1978 the enforcement of the summons (Pet. App. C and D.)

Upon appeal to the Sixth Circuit, the Court affirmed the use of the "control group" test and adopted it as the appropriate standard for determining the existence of corporate privilege.[2] 600 F.2d 1223 (6th Cir. 1979).

The Sixth Circuit described the two "tests" from which it had to choose as follows:

> The difficulty arises when, after the attorney-client relationship has been established by the top management, communications are made to counsel by subordinate corporate agents and employees. Some courts, notably the Seventh and Eighth Circuits, have adopted the position that such communications are privileged if certain conditions are met. The specification of the conditions varies, but the sum and substance are similar: If the agent is in possession of information acquired in the ordinary course of business relating to the subject matter of his employment, and the information is communicated confidentially to corporate counsel to assist him in giving legal advice to the corporation, then the communication is privileged. Under this "subject-matter" approach, the privilege does not cover communication of pre-existing

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[2] The Court reversed that part of the lower court's decision which found certain communications non-privileged which were made by apparent members of the "control group" and ordered, on remand, the factual determination of that question. 600 F.2d at 1227-8.

documents prepared for independent business reasons or communications unrelated to the subject matter of the agent's employment. Other courts have adopted a narrower approach which covers only those communications made by the so-called "control group" of the corporation, namely, those officers, usually top management, who play a substantial role in deciding and directing the corporation's response to the legal advice given. (600 F.2d at 1226) (footnotes omitted).

The Court rejected the "subject matter" test for two explicit reasons. First, the Court felt that that test "encourages senior managers purposely to ignore important information they have good business reasons to know and use" (600 F.2d at 1227); and second, that test ". . . fosters situations in which the *only* record of the full details of a particular transaction is in the hands of corporate counsel and . . . undiscoverable" (*Id.*) (emphasis in original.)

INTEREST OF THE AMICUS CURIAE

The Committee on Corporate Law Departments includes among its members the chief legal advisors of a number of major United States corporations. Consequently, the resolution of the scope of attorney-client privilege for corporations is a matter of vital importance to the Committee's membership.

ARGUMENT

This case presents an important question vital to the proper functioning of the legal profession in its duties to its corporate clients. The determination of who can be appropriately designated as a "representative" of a corporation for attorney-client privilege purposes is one that must be made using a uniform, predictable and national standard. More than that, such a standard is needed which fully and fairly reflects the reality of corporate life and society's need for corporations to receive unobstructed, frank and competent legal advice. Failure to provide such a result will impede the ability of attorneys to effectively counsel corporations and, in consequence, possibly frustrate their corporate clients' desire and obligation to obey the law. The Committee on Corporate Law Departments believes the decision below, with its adoption of the "control group" test, is incorrect and that the decision, by reinforcing the existing conflict between circuits regarding the appropriate test, requires review by this Court.

1. The decisions of the Courts of Appeals for the Seventh and Eighth Circuits in *Harper & Row Publishers, Inc.* v. *Decker*, 423

F.2d 487 (7th Cir. 1970 (per curiam), *aff'd without opinion by an equally divided Court*, 400 U.S. 348 (1971) and *Diversified Industries, Inc.* v. *Meredith*, 572 F.2d 606 (8th Cir. 1978) (en banc), are in direct conflict with the decision below and with the decision of the Court of Appeals for the Third Circuit in *In re Grand Jury Investigation*, 599 F.2d 1224 (3rd Cir. 1979).[3]

Corporations and their counsel are thus faced with conflicting tests used to determine the existence of privilege for communications with corporate personnel. Should corporations be litigants in the Third or Sixth Circuits they must meet the stringent requirements of the "control group" test which was formulated in 1962 by the District Court in *City of Philadelphia* v. *Westinghouse Electric Corp.*, 210 F. Supp. 483 (E.D. Pa. 1962), *mandamus and prohibition denied sub nom. General Electric Co.* v. *Kirkpatrick*, 312 F.2d 742 (3rd Cir. 1962), *cert. denied*, 372 U.S. 943 (1963). That court held that privilege only applied when an "employee making the communication, of whatever rank he may be, is in a position to control or even to take a substantial part in a decisions about any action which the corporation may take upon the advice of the attorney, or if he is an authorized member of a body or group which has that authority." 210 F. Supp. at 485.

As exemplified by its application in the decision below, there can be no certainty under the "control group" test that communications with counsel involving corporate employees below the highest level of management will be found to be privileged. Given the mandated application of the "control group" test in two circuits coupled with the board geographic coverage of many corporations, prudence may dictate that observing the strictures of this, the most restrictive test, is the only practical alternative for corporations and their counsel to attempt to protect the confidentiality of their legal communications. Thus, a type of Gresham's Law of privilege prevails which allows a minority of the Courts of Appeals to decide the law of the land in this important area. Only a definitive ruling by this Court can remedy this situation.

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[3] In addition, in *Natta* v. *Hogan*, 392 F.2d 686 (10th Cir. 1969) the Tenth Circuit, while not required to choose between alternative tests, did approve the application of "control group" test.

2. The Committee's desire for this Court's review of the decision below is not merely because of the desirability of having a uniform standard adopted by the highest court in the land. Indeed, the Committee believes in the necessity of review in this case because of its strong belief that the widespread use of the "control group" test will hamstring the desirable process of self-evaluative "legal audits" of corporate behavior and seriously impair the ability of corporate counsel to serve their clients.

These are strong sentiments which we believe are supported by seasoned evaluations of the practical and predictable results of limiting the privilege solely to communications with employees empowered to take action on the legal advice received as the decision below has done.

There is every reason in the public interest to encourage corporations and their counsel to freely investigate corporate behavior and determine whether the law is being obeyed. Such "soul-searching" is far more likely to be honest and fruitful if corporate counsel can conduct it in a professional manner under protection of privilege. If apparent wrongdoing comes to light, the probability is slight that it could be concealed, even though the government enforcement agencies or the private litigants may have to develop the full facts on their own which, given our liberal rules of discovery and adversary system of justice, is an appropriate "burden".

Besides discouraging voluntary investigations, precise and competent legal advice generally will no longer be available to corporations and their employees thereby creating the risk of inadvertent or colorable violations of law by both individual corporate employees as well as the corporation itself. If the "control group" test is upheld, facts will be driven underground and counsel may be compelled to rely on word-of-mouth advice to senior management and to boards of directors—a method fraught with obvious shortcomings. This unfortunate and clearly dangerous practice may flow necessitously from the fact that attorneys will be hesitant to talk, let alone document any such conversations, with any corporate employee below the highest level of management. This means, quite simply, that corporate counsel will not have effective access to those very individuals who may have both the most relevant knowledge of the subject matter in question and the greatest immediate need to have competent legal advice.

Some have suggested that the availability of corporate privilege or the lack thereof, does not affect the ability of corporate counsel to obtain information from employees outside the control group.[4]

What those advocating that position fail to perceive is the recognition that, with the increase of individual employee liability for violations of federal law, the clear understanding (which counsel would be obliged to convey) by employees that whatever information they gave to corporate counsel was discoverable, either through documents or even the counsel's testimony, would lead to the Hobson's choice of either making possibly self-incriminating remarks available to the world or denying the corporate-employer the ability to gather facts necessary to defend or to correct questionable behavior. There is no reason for the corporation to conduct its internal investigations on an adversary basis in which the employees called upon to provide information must first employ their own counsel and engage in a lengthy preliminary legal exercise to determine whether indeed they may safely speak, regardless of their obvious duty to do so.

Placing potentially hundreds of thousands of corporate employees into this silent twilight world can only utterly frustrate their own and their employers' ability to obey the law. At the same time, members of the legal profession see their role as trusted advisors turned into that of unwilling witnesses of their client's confidences. The Court should not allow this disintegration of the privilege to occur.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be granted.

Respectfully submitted,

Committee on Corporate Law
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[4] *See, e.g., In re Grand Jury Investigation,* 599 F.2d 1224, 1236 (3rd Cir. 1979).

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